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## REVIEW

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### ELY'S PROPERTY AND CONTRACT<sup>1</sup>

WE are indebted to Professor Ely for an excellent book. It ought to prove interesting and instructive to economists and lawyers alike; to economists because it contains a careful and accurate account of the leading decisions of the courts with reference to property and contract that bear on economic discussion; to lawyers because legal decisions are treated in a broader way than as mere precedents, and with reference to the philosophical reasons that underlie the decided cases. The book is to be particularly commended to lawyers because most of them are content with the philosophy of Blackstone and attend only to those changes since Blackstone's day that appear in the decisions of the courts, where the fundamental ideas are rather taken for granted than philosophically discussed. If Professor Ely's two volumes were but printed in one, with a larger page, bound in law sheep or buckram, and with the citations of cases at the foot of the page instead of at the end of the chapters, the book might pass for a law book. There is the familiar table of cases at the beginning, and the list is long enough to include the important cases without the common padding that enables publishers to say, — as if that were a merit, — that there are cited so many thousand more cases than have been cited before. As far as I have been able to test the list, it includes those cases that have really contributed to the development of the subject, and Professor Ely cites them with an accuracy unusual in a layman. In an appendix Professor Orth has made a

<sup>1</sup> Property and Contract in their Relation to the Distribution of Wealth, by Richard T. Ely, Ph. D., LL. D., Professor of Political Economy in the University of Wisconsin, 2 vols. The Macmillan Company New York

useful collection and analysis of illustrative cases, which he modestly hopes may be helpful to readers who desire to familiarize themselves with the legal aspects and difficulties involved.

Professor Ely's style is clear and perspicuous, and his vocabulary for the most part untechnical. Economists ought to be able to understand his statement of the law, and lawyers his statement of economic theory. A study of the book ought to help bring together two classes who often have the same problems to deal with under different aspects, and often fail to understand each other; the lawyers looking upon the economists as radical, the economists looking upon the lawyers as unprogressive. In fact, as Professor Ely shows, the "socialization of the law" has been brought about chiefly by decisions of the courts; and as this book itself demonstrates, the point of view of the more thoughtful economists is what would be considered, at least in these days, if not conservative, certainly far from radical.

It would be an error, however, to give the impression that the book is essentially either a law book or a text book. It really deals in a philosophical way with the concepts of property and contract in their relation to the distribution of wealth. Professor Ely necessarily draws upon the store of judicial decisions, especially those under the due process clause of the Fourteenth Amendment; but he draws largely also on philosophical writers from Lord Bacon down, nay from the author of Deuteronomy to the present time. He has been influenced especially, as he frankly acknowledges, by the Germans, to whom he frequently refers, especially by Conrad, Wagner, and, above all, Knies.

Some of the salient lines of thought are as follows. In both production and distribution, man himself is the element of chief significance, since wealth is the product of man's labor, and the product varies with man's efficiency and willingness to work, which may depend largely upon the distribution of the product. Society itself is limited in what it can do in changing the laws of distribution, by the reaction of such changes in distribution on production considered with

respect to quantities and qualities of wealth produced and to the direction of production. Associations like the Shakers completely regulate distribution, but their product is so limited that the average income is not large. The Amana Society of Iowa, the most successful of existing communistic societies, with a great deal of valuable Iowa land, affords comfort to all, but of a meagre sort, scarcely compatible with a high civilization.

Distribution of wealth at a given time depends upon the socio-economic order that then exists. This, altho the chief thing to be considered, is not the only one; others are important, — industrial technique, bounty of the physical environment, distribution of individual abilities and aptitudes. In the existing socio-economic order there are five fundamental institutions of first rank: (1) Property, public and private; (2) inheritance; (3) contract and its conditions; (4) vested rights; (5) personal conditions. In addition there are five fundamental forces of the second rank: (1) custom; (2) competition; (3) monopoly; (4) authority; (5) benevolence. It is these fundamental institutions and forces that radical socio-economic reformers desire to change. "It must be admitted," says Professor Ely, "that if the changes they desire are to be recommended, the socialists are proceeding in the right way to bring about these changes. They are attacking the fundamentals, and no doubt if the fundamentals could be changed they could change without limit the distribution of wealth; but, on the other hand, their changes might bring about (a) disastrous results as to production, (b) other evil social consequences." I quote the exact language, because the whole work is an effort to combat the proposals of the radical socio-economic reformers in the interest of what the author thinks, and surely with reason, a truly conservative view; an effort all the more effective because intelligent and fair minded.

The first fundamental institution is private property. Private property is a complex thing, — a bundle of rights; an idea which is coming more and more to be recognized, and credit for which is given to a decision of the Supreme Court

of New Hampshire in 1872. The tendency is toward an increasing public interest in private property, but there is no tendency toward an abrogation of the right. To abolish private ownership in land would destroy security and shake the foundations of society, and while the author approves our American system of taxation on the full selling value of land, — which approximates some features of the single tax, — he recognizes that it does result in those evils which Marshall thinks would result from a property tax on site values exclusively; it adds to the value of some properties at the expense of others, and results in hasty and inappropriate building. No one who has seen the class of buildings called “tax-payers” will fail to appreciate the soundness of this conclusion.

Reference is made to the great Vanderbilt fortune, built on the private ownership of railroad systems, and to the great fortune of the family of Thurn and Taxis, built on the century-long control of the postal system in Germany. The discrimination of the author in his statements is well illustrated by his calling attention to the fact that while those fortunes would not have been possible if the American railroads and the German postal systems had been public property from the beginning, there is no necessary inference that the fortunes thus acquired are or are not a good thing for society. Another illustration of his care is to be found in repeated references to New Zealand, which to the ardent reformer is the place where all good things are to be found, just as the poet thought that perfect peoples and perfect kings might dwell in Mercury, Venus or Mars. Professor Ely more than once expresses his doubt of the success of the New Zealand legislation. And in general he remarks: “The enthusiastic reformer must be cautious in drawing practical conclusions. It is at least conceivable that public waste and civic demoralization may result from the suggested extension of the sphere of public action and narrowing of the field of private activity. Also, it must be considered what use would be made by organized political society (the state in the generic sense) of the potential gains of public industry. Would a

better use be made of wealth as a whole than is made now ? ”

The same thought recurs in dealing with industrial liberty. Political restrictions, it is pointed out, often mean economic freedom. The important question “so often overlooked by the socialists and their opponents is this: will authority be more wisely exercised when seated in government or when seated in private property ? Will authority be more wisely exercised when it is political in nature or when it is economic in nature ? . . . And another question is: will authority be more wisely exercised when it has a mixed source, partly in economic and partly in political institutions ? ”

Private property, then, is an institution lying at the foundation of our present social order, and not to be abrogated. Private property is the exclusive right of a private person to control an economic good; it is exclusive in its nature, but not absolute; it is a bundle of rights. The Roman Law defines it as the right of using and consuming in so far as the reason of the law permits. The Prussian code of Frederick the Great defines a proprietor as “that one who is competent directly himself, or indirectly through an agent, to exercise control over the substance of a thing or of a right to the exclusion of others,” but his rights are subject to the qualifications that “no one may misuse his property to injure others.” The Napoleonic code says: “Property is the right of using things and of controlling them in the most absolute manner, provided that one does not make a use of them prohibited by the laws or ordinances.” The new German code says: “a proprietor has a right to use a thing as he sees fit, to the exclusion of others, in so far as there are no limitations which come through law or through the rights of third persons.” All these definitions, under different systems of jurisprudence at widely separate points of time, recognize the qualification of the right of private property. Our system recognizes it also. In some things, notably wild animals (including even dogs, as the United States Supreme Court has held), air, light and water, property is not full and complete; but even the right of property in things where

it is most full and complete is qualified by the state's right of taxation, of eminent domain, and the police power, three public rights corresponding to the qualification "in so far as the reason of the law permits" of the civilians. Property does not carry with it the right of misuse; yet waste and misuse are tolerated. How can the conflict be reconciled? "The fact is just this: the misuse or the abuse of things is not a part of the right of property when we reduce property to its essence, but it is something which may exist because no way can be devised to prevent it without interfering with the institution of property. It is difficult to frame laws which will prevent a misuse without at the same time preventing a proper use." We wish the draftsmen of some of our recent legislation who so cheerfully undertake to remake our law without considering its history, its connection with legal principles, or its underlying reason, might appreciate the difficulty of which Professor Ely speaks.

Property has its social side, as represented by the right of taxation, the right of eminent domain, the right to exercise the police power, the right to control transfers, especially by way of inheritance, the right to exempt certain property from execution and distress in order that a man may not be deprived of the means of doing his part in the work of the world by working at his trade or calling. An absolute right of property, free from these restrictions for the benefit of organized society, would, as Ihering says, result in the dissolution of society.

It is these considerations that sustain one of the main theses of the book, that private property is established and maintained for social purposes. It becomes more intensive and less extensive, or more extensive and less intensive, according to the state of development of organized society at the time. In early days the ownership of land in common seems to have been for the general interest. Later, commons were enclosed and became private property because a more intensive cultivation was for the general interest. Professor Ely doubts whether the legislation giving the Indians their land in severalty instead of allowing it to be held in common

by the tribe, is for the advantage of the Indians themselves in their existing state of development. Property in severalty, he says, is undoubtedly in general better for those who have attained the highest stage of economic civilization. It leads to greater production, nor does it clearly lead to a worse distribution, altho unquestionably to a far more unequal one.

Private property is developing along five lines: (1) an increase in the mass of free goods; (2) a restriction of the extent of private property and a corresponding extension of public property; (3) a development of the social side of private property; (4) an extension of private property along certain lines; development of rights akin to private property; (5) changes in the modes of acquisition of private property.

Private property yields the best results when the social benefits of private property accrue (a) largely spontaneously, as in the case of agricultural land, where in the main there is an identity between the interest of the farmer and the interests of the general public; (b) when occasionally they are secured with ease by slight applications of force, as in the use of private forests in Germany as pleasure grounds, or the rights of way and paths across fields in England; (c) when the social benefits of private property are secured as the result of single public acts occurring at considerable intervals, as in the case of taxation; (d) when in more or less frequent cases a continuous and considerable application of force may be needed to bring its management up to a socially established ethical level; the author is here thinking chiefly of labor legislation.

Enough has been quoted to show Professor Ely's point of view. The reader must be left to fill in the argument from the book itself. It is not surprising to find that the author looks forward hopefully to the universalization of private property, very much as education has been universalized, by means of savings banks, insurance, safe investments in well-guarded corporations, assistance in the purchase of land; and to the socialization of private property by throwing open to public use private possessions, such as the Thiergarten in



Berlin and the royal galleries in Munich (a sphere in which Europe is in advance of the United States), and to the increase in the feeling of social obligation to contribute to the public good (a sphere in which Americans are probably ahead of Europeans). He also looks forward to a considerable transformation of private property into public property by means of the power of eminent domain, with full compensation even in the case of corporations with watered stock. He takes a broader view of the powers of the state to effect this transformation than would be commonly taken by lawyers. But public necessity and public utility are relative and ill-defined terms, and we are probably destined to see a broadening of our ideas in this respect, as we have seen it in the extension of the police power. As Professor Ely says, even a railway is not strictly speaking a public necessity, however desirable it may be; and the well-established right to take private property for railways is destined to be applied in many other ways. No one can read recent decisions of the United States Supreme Court without seeing how elastic the right of eminent domain is, and the possibility of its unlimited development.

The true theory of property, he says, is the general welfare theory. The words "point to the permanent basis of property in social utility and they indicate the nature of its evolution. . . . Property exists because it promotes the general welfare, and by the general welfare its development is directed. . . . It is a theory of social evolution, because as society is in a flux, property can accomplish its end only by a corresponding evolution. It is a legal theory, because property in itself implies law; and it is only through law that possession ripens into property. At the same time the words used to describe the theory show that law cannot be arbitrary."

Space lacks for anything but the briefest reference to Professor Ely's commendation of the work of American courts, a commendation all the more pleasing because unexpected; his condemnation of the recall of judges and the recall of decisions; and his insistence on security of tenure

and adequate pay. After these declarations it is not surprising that he praises the Federal Constitution and its flexibility, while commending also as one of its strong points that it prevents wobbling back and forth from one thing to another. "We have then every element we need already, either in our constitutional systems or easily placed there when once all our law-making, law-executing and law-interpreting bodies move out of the past into the light of the twentieth century." I cannot, however, look with approval upon his suggestion that adverse decisions can be overruled by the creation of new judges, as the opposition of the House of Lords has been overruled by the creation of new peers. It is far better to wait until public opinion is finally settled on a disputed question, and time makes it possible to determine whether proposed changes are real reforms or not.

The book ought to have many readers, and all would find it suggestive and helpful. They will look forward with much expectation to the coming book by the author on landed property and the rent of land.

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